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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/730,438	12/08/2003	Martin Schnabel	CM2713Q	2354

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EXAMINER

MARCETICH, ADAM M

ART UNIT	PAPER NUMBER
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3761

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/730,438	Applicant(s) SCHNABEL ET AL.	
	Examiner ADAM MARCETICH	Art Unit 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 14 December 2007.
- 2a) This action is **FINAL**.
- 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-9 is/are pending in the application.
 - 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-9 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 - Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 - Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All b) Some * c) None of:
 - 1. Certified copies of the priority documents have been received.
 - 2. Certified copies of the priority documents have been received in Application No. _____.
 - 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)
 - Paper No(s)/Mail Date 16 Jan 2004.
- 4) Interview Summary (PTO-413)
 - Paper No(s)/Mail Date. _____.
- 5) Notice of Informal Patent Application
- 6) Other: _____.

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 14 December 2007 has been entered.

Claim Rejections - 35 USC § 103

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. Claims 1 and 2 are rejected under 35 U.S.C. 103(a) as being unpatentable over Noda et al. (US 6,949,689) in view of Yeo et al. (US Patent 5,695,855).

5. Noda discloses a disposable diaper 1 having absorbent member 4 interposed between a liquid permeable topsheet 2 and a liquid impermeable backsheet 3 (column 2, lines 29-32), wherein the backsheet 3 comprises a first nonwoven material 3b superposed on a breathable film 3a (column 2, lines 53-57), the backsheet having a multi-color printed pattern/ornamental design 10 (column 4, lines 9-14, figure 1), said backsheet having an L-value of about 10 to 93, a b-value of -5 to 0 and a c-value of less than 20 (column 4, lines 25-67), and a light transmittance/opacity of 40 to 83% (column 5, lines 5-16). Since Noda discloses a prescribed pattern 10 printed on backsheet 3, it naturally follows that backsheet 3 comprises pigments (column 4, lines 9-14).

Noda discloses the invention as substantially claimed, see above. However, Noda lacks a nonwoven web color-pigmented by one or more pigments mixed into the polymeric material as claimed [claim 1]. Yeo discloses a nonwoven web color-pigmented by one or more pigments mixed into the polymeric material (column 4, lines 27-46 and column 9, lines 58-67 through column 10, lines 1-8, adhesive-based ink). Yeo provides the advantage of enhanced wear resistance for personal care products (column 2, lines 9-28, especially lines 14-21 and 25-28). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Noda as discussed with the mixed pigments as taught by Yeo in order to enhance wear resistance.

6. Claims 1 and 3-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tao et al. (WO 99/32164) in view of Rogers (US 5,133,707), further in view of Yeo et al. (US Patent 5,695,855).

7. Regarding claims 1 and 3-6 Tao discloses film comprising non-woven material and microporous film (page 1, lines 28-30, page 11, lines 27-31) used for diaper 50 back sheet 52 (page 10, lines 1-3) having single or multiple ornamental discernible printed design graphics 20 via flexographic and gravure printing processes (page 8, lines 14-16, figures 1 and 4) and said film composite having an “L value” of 93.46, “a value” of -0.24 and “b value” of 0.35 (page 3, lines 2-9, page 8, lines 19-21, page 13, lines 9-13), said graphic not covering more than about 60% of the back sheet (figures 1-4). Tao *does not expressly disclose* an L value from 10-75. Rogers discloses a composite adhesive fastening tape 2 for use with diapers (column 2, lines 7-20) with an L value of 50-75 (column 4, lines 24-27), wherein the L value is a result effective variable since raising an L value results in an improved obscuring effect (column 4, lines 19-22). Therefore, it would be obvious to one of ordinary skill in the art at the time the invention was made modify Tao with the claimed L values for improved obscuring effect since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch and Slaney*, 617 F. 2d 272, 205 USPQ 215 (CCPA 1980). Furthermore, where the claimed and prior art products are identical or substantially identical in structure or composition, or are produced by identical or

substantially identical processes, a prima facie case of either anticipation or obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977).

Tao in view of Rogers discloses the invention as substantially claimed, see above. However, Tao in view of Rogers lacks a nonwoven web color-pigmented by one or more pigments mixed into the polymeric material as claimed [claim 1]. Yeo discloses a nonwoven web color-pigmented by one or more pigments mixed into the polymeric material as discussed for the rejection of claim 1 over Noda in view of Yeo. Regarding rationale and motivation, see discussion of claim 1 over Noda in view of Yeo above.

8. Regarding claim 7, Tao in view of Rogers in view of Yeo discloses the invention as substantially claimed, see above. Tao further discloses a spacing between an absorbent core 66 and rear waist edge in Fig. 4.

However, Tao in view of Rogers in view of Yeo is silent to the specific distance between a rear end edge and a rear core end edge being about 40 mm. However, this parameter is deemed a matter of design choice well within the general skill of the ordinary artisan, obtained through routine experimentation in determining optimum results. Thus, it would have been obvious to one of ordinary skill in the art to modify the distance between a rear end edge and a rear core end edge as claimed as a mere design choice lacking any criticality of size as being merely preferable for the intended purpose of securely attaching a backsheet and topsheet. Where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not

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perform differently than the prior art device, the claimed device was not patentably distinct from the prior art. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” See *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

9. Claims 8-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Noda et al. (US 6,949,689) in view of Yeo et al. (US Patent 5,695,855), further in view of McFarland et al. (US Patent 6,096,412).

Noda in view of Yeo discloses the article as discussed above for claim 1. However, Noda in view of Yeo *does not expressly disclose* a half-toning printing process as claimed [claims 8-9].

McFarland discloses a process of printing absorbent articles with a halftoning printing process (column 1, lines 14-24 and column 17, lines 52-60). Examiner notes that the process of halftone printing necessarily involves printing with an opaque ink (online encyclopedia, p. 1, paragraph 3), which is covered by dots to produce the effect of an additional color (online encyclopedia, p. 1, paragraph 2).

A halftone printing process creates the effect of additional colors for a user (McFarland column 17, lines 52-60). The practice of printing within an area of a nonwoven web or major surface as claimed falls within the scope of obviousness, as required to print graphics on different areas of a diaper. McFarland provides the advantage of enhanced resolution, in addition to reducing ink rub-off during use for a

user (column 1, lines 14-24 and 42-55). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the invention of Noda in view of Yeo as discussed with the halftoning process as taught by McFarland in order to enhance graphic resolution while reducing ink rub-off.

Response to Amendment

10. Rejection of claim 2 under 35 USC § 103 of Tao in view of Rogers in view of McCormack applied in the Office Action mailed 09 August 2007 is withdrawn in view of the amendments filed 14 December 2007.

Response to Arguments

11. Applicant's arguments with respect to claim 1 regarding a lack of pigments mixed into a polymeric material have been considered but are moot in view of the new ground(s) of rejection. See Yeo et al. (US Patent 5,695,855) as discussed above.

12. Applicant's arguments with respect to claims 8-9 regarding a lack of halftoning process have been considered but are moot in view of the new ground(s) of rejection. See McFarland et al. (US Patent 6,096,412) as discussed above.

13. Applicant's arguments filed 14 December 2007 have been fully considered but they are not persuasive.

14. Applicant asserts that Noda does not teach an L-Hunter value on the Hunter scale for darkness/lightness appearance from about 10 to about 75 in the areas outside

the printed ornamental designs, as recited in claim 1 of the present application.

Examiner notes that the limitation of an L-Hunter value as claimed [claim 1] is being interpreted as nonfunctional printed matter, and therefore not patentable subject matter. There is no new and unobvious functional relationship between the printed matter and the substrate. See MPEP 2112.01(III).

15. Applicant asserts that construing the printed portions and the non-printed portions of the backsheet of Noda as having the same or interchangeable L-values is improper, since Noda distinguishes the portions of the backsheet having printing and the portions not having printing. Examiner notes that selecting different regions to print indicia or markings is within the scope of obviousness, and that the function of an absorbent article is not affected by these selections.

16. Applicant asserts that the combination of Tao and Rodgers is improper, since the modification lowering the L-value of the polymer film of Tao would produce an unacceptable yellow shade. Examiner notes that an L-value represents a composite of colors and translates into overall brightness. Producing a yellow shade would require intensifying a yellow component, or simultaneously reducing cyan and magenta components. In other words, producing a "yellow" shade would require modification of color components, not exclusively brightness components.

17. Applicant further asserts that Rogers does not teach or suggest the L-value recited in claim 1 of the present application, since one of ordinary skill in the art would merely seek to optimize the obscuring effect by obtaining the highest L-value possible (i.e., 100), and not the L-value range recited in claim 1. Examiner notes that a L-value of

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100 represents an ideal situation, although a high L-value will also provide a desired masking or obscuring effect when other limitations require a value below 100.

18. Applicant requests clarification of the rejection for claims 5 and 6. Examiner notes that both claims 5 and 6 are addressed by Tao in view of Rogers, further in view of Yeo as discussed above.

19. Applicant asserts that the Office's reliance on figures 1-4 of Tao to teach the particular dimensions recited in claim 5 of the present application is per se improper, citing *Hockerson-Halberstadt, Inc. v. Avia Group Int'l*. Examiner notes that the area used for ornamental designs is being interpreted as nonfunctional printed matter, since the degree of printing does not affect the functionality of the absorbent article. In other words, absorbent articles having different areas of ornamental graphics will have the same functionality. Criticality of the claimed values of printed areas in claims 5 and 6 are lacking in the immediate specification. While an increased area (more than 90%) of ornamental designs on an area coinciding with an absorbent core is disclosed in the immediate specification for the purpose of masking stains, criticality of this area is lacking.

Examiner also notes that a measurement of ornamental design area is not defined in the specification, and is therefore subject to broad interpretation. For example, it is unclear whether areas directly underneath contacted by ink are included, or whether regions enclosed by printing but not directly printed are also considered.

20. Applicant asserts that as previously discussed, the proposed modification of Tao (i.e., lowering the opacity value to what is recited in claim 2 of the present application) is

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contrary to the express disclosure of Tao, and is therefore improper. Examiner notes that producing a “yellow” shade would require modification of color components, not exclusively brightness components as discussed above.

21. Applicant also asserts that there is no teaching or suggestion to lead one of ordinary skill to modify the opacity values to obtain the range of opacity recited in claim 2 of the present application. Examiner notes that there is motivation to alter opacity in order to improve color contrast. For example, modifying the opacity value of an absorbent article allows pigments to be readily seen by users. A low opacity value may produce a transparency effect, reducing the bold appearance of these pigments.

22. Applicant asserts that the additional colors produced by a halftoning printing process are more than simply a perceptual phenomenon. Examiner notes that a halftoning printing process as discussed by McFarland necessarily produces the effect of an additional color, as further noted in the online encyclopedia article.

Conclusion

23. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

- ❖ Daniels; John Y. et al. US 4438169 A
- ❖ Jones; Frank R. US 5236645 A
- ❖ Nissing, Nicholas James US 20040058130 A1
- ❖ Nissing, Nicholas James US 20030044578 A1

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to ADAM MARCETICH whose telephone number is (571)272-2590. The examiner can normally be reached on 8:00am to 4:00pm Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on 571-272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Adam Marcetich/

Examiner, Art Unit 3761

/Tatyana Zalukaeva/

Supervisory Patent Examiner, Art Unit 3761